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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 493

ISBRANDTSEN COMPANY, INC.,
Petitioner,

vs.

MATTHEW JOHNSON,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Isbrandtsen Company, Inc. respectfully prays that a writ of certiorari may issue out of this Court directed to the United States Court of Appeals for the Third Circuit to review the final judgment of that Court in an appeal docketed in said Court as No. 10,312, which affirmed a judgment in favor of the Respondent entered by the United States District Court for the Eastern District of Pennsylvania.

Summary and Statement of Matter Involved

This is a libel in admiralty by Respondent, a merchant seaman, to recover wages, the value of transportation from Philadelphia, Pennsylvania to Seattle, Washington and "double wages" under R. S. Sec. 4529, 46 U. S. C. A. Sec. 596.

Respondent joined the crew of Petitioner's steamship "Stephen W. Kearny" as a messman on February 3, 1948 at Seattle, Washington. On April 21, 1948 while the vessel was in the South Pacific en route to the United States, an altercation took place between Respondent and one Wells Brandon, another crew member, during which Respondent without justification attacked Brandon with a knife and wounded him so severely that it was necessary to divert the vessel from its course in order to get Brandon to a hospital (R. 15a).

As a result of Respondent's attack upon Brandon and the diversion of the vessel, Petitioner incurred expenses and losses amounting to $1,691.55 (R. 15a), representing the cost of hospitalization, medical care, repatriation and subsistence for Brandon, and the vessel's operating expenses attributable to diversion of the "Stephen W. Kearny" to the Island of Tonga.

After his assault upon Brandon, Respondent was confined aboard the vessel, and performed no duties. No wages were credited to Respondent after the date of the assault, and as the issues ultimately developed upon trial, Respondent made no claim for wages subsequent to April 21, 1948 (R. 13a).

When the voyage terminated at Philadelphia, Pennsylvania on May 31, 1948, Respondent was removed from the vessel by federal police authorities. He was not present at the pay-off of the crew on June 3, 1948. On June 11, 1948 Respondent's attorney made a demand upon Petitioner by

telephone for the payment of Respondent's wages, which demand was refused. Petitioner refused to pay Respondent because it set off the wages which had accrued to Respondent prior to the stabbing incident against the expenses incurred by Petitioner as a result of Respondent's assault upon Brandon (R. 13a).

Respondent then filed the present libel in admiralty. As originally drawn, the libel claimed wages in the amount of $750.27 and in a second cause of action claimed the value of transportation from Philadelphia, Pennsylvania to Seattle, Washington and "double wages" for withholding the wages and value of transportation which Respondent alleged were due him. Certain other issues not here material were raised by the original pleadings, but were subsequently removed from the case by stipulation (R. 12a). Likewise, by stipulation, the net amount of wages claimed by Respondent was asserted to be $439.27, and Petitioner admitted that as of April 21, 1948, the date of the stabbing incident, there had accrued to Respondent net earnings in that amount, which Petitioner refused to pay. Petitioner denied that Respondent was entitled to receive the sum of $439.27, or any part thereof (R. 12a).

Petitioner, in its answer to the libel, set up as a separate, complete and affirmative defense, and by way of counterclaim, that Respondent had attacked Brandon, wounded him and necessitated diversion of the vessel, and that by reason of the assault, Petitioner had incurred certain expenses. Petitioner further averred that the wages which would otherwise have been due Respondent had been lawfully retained by Petitioner on account of its loss, and claimed the balance of its loss from Respondent (R. 9a-10a).

The case proceeded to trial in the District Court before Chief Judge Kirkpatrick, who rendered his opinion on May 19, 1950. The Trial Judge found that the "facts upon which

[Petitioner's] affirmative defense and counterclaim are based are fully established by the evidence" (R. 15a). However, he awarded Respondent wages in the amount of $439.27, plus the value of transportation, but denied Respondent's claim for "double wages." On June 21, 1950, a final decree was entered in conformity with Judge Kirkpatrick's opinion (R. 18a), from which Petitioner took an appeal to the United States Court of Appeals for the Third Circuit.

On August 17, 1951, the Court of Appeals, in an opinion by Chief Judge Biggs, affirmed the judgment of the District Court (R. 32-36).

The Court of Appeals held that Petitioner could not recoup or set off its loss contemporaneously with Respondent's claim because Congress, in R. S. Sec. 4596, 46 U. S. C. A. Sec. 701, had "legislated in the field of assaults committed by seamen and saw fit to prescribe no penalty for an assault by seaman on seaman" (R. 35). In further support of its conclusion, the Court of Appeals adverted to the status of seamen as "wards of the admiralty," and expressed reluctance to "wipe away the benefits conferred by the statutes on seamen as a class because of the criminal conduct of one seaman" (R. 34).

Petitioner filed with the Court of Appeals a petition for rehearing (R. 38-47), which was denied on September 27, 1951 (R. 48). The present application for a writ of certiorari followed.

Jurisdiction

Petitioner's petition for rehearing in the United States Court of Appeals for the Third Circuit was denied on September 27, 1951. The jurisdiction of this Court to entertain this petition and to grant the same is provided in Sec. 1254 (1) and Sec. 2101 (c) of Title 28, United States Code.

Questions Presented

1. Is not R. S. Sec. 4596, 46 U. S. C. A. 701 a penal statute, and did not the Court of Appeals err in construing it to govern the civil rights and liabilities of seaman and shipowner, *inter se*, in a dispute involving solely the amount of money owing by one to the other at the conclusion of the voyage?

2. Under the general maritime law, cannot a shipowner, in an action for wages and other financial emoluments by a seaman, set off or recoup the amount of pecuniary loss sustained by the shipowner as the result of a deliberate act of the seaman in violation of the contract of employment?

3. Did not the Court of Appeals err in invoking the doctrine that "seamen are wards of the admiralty" to support its denial of the equitable right of set-off or recoupment to a shipowner against whom a monetary claim had been asserted by a seaman who had attacked with a deadly weapon and seriously wounded a shipmate?

Reasons Relied upon for Allowance of the Writ

1. The decision of the Court of Appeals for the Third Circuit is in direct conflict with the decision of the Court of Appeals for the Ninth Circuit in *Oldfield* v. *The Arthur P. Fairfield*, 176 F. (2d) 429, certiorari denied 338 U. S. 879.

In the *Oldfield* case, the Court of Appeals for the Ninth Circuit permitted a shipowner to set off against wages claimed, the libellant's pro rata share of a fine paid by the shipowner for release of the vessel, which had been imposed by Dutch customs officials because of a smuggling attempt in which the libellant had participated. The libellant had not been tried for the offense of smuggling and *a fortiori* had not been convicted. Although R. S. Sec. 4596

provides no "penalty" or "punishment" for the seaman under these circumstances, the Court of Appeals held that this fact cannot be construed as an abolition of the equitable right of recoupment on the part of the shipowner.

The Court of Appeals in the case at bar squarely rejected the authority of the *Oldfield* case (R. 33). Thus there are presently existing two diametrically opposite views as to whether the shipowner's right to set-off or recoupment is limited to those instances in which the seaman has exhibited a type of conduct specifically proscribed by R. S. Sec. 4596.

2. The decision of the Court of Appeals for the Third Circuit is in conflict with the reasoning and basis of decision of the Court of Appeals for the Second Circuit in *Shilman* v. *United States,* 164 F. (2d) 649, certiorari denied 333 U. S. 837.

In the *Shilman* case, the United States in its capacity as shipowner, in a seaman's action for wages, attempted to set off the amount of a fine imposed upon the seaman-libellant by an United States Army court martial in a foreign country. In its opinion (164 F. (2d) 652), the Court of Appeals cited several cases under the general maritime law wherein set-offs had been allowed arising out of expenses incurred on behalf of the ship in connection with the voyage, which were attributable to the seaman's conduct. The Court then proceeded to distinguish the case before it on the ground that in the pending action, the shipowner was not seeking to recover any expenditure caused during the course of the voyage, or for the benefit of the ship; nor was there any evidence that the ship or her owner had suffered any loss by reason of the libellant's conduct. The clear implication of the *Shilman* opinion, insofar as it pertains to the present problem, is that the Court of Appeals for the Second Circuit construed the cited cases under the general

maritime law as authoritative and applicable upon their facts.

3. The decision of the Court of Appeals for the Third Circuit is in conflict with the earlier decision of the Court of Appeals for the Second Circuit in *The W. F. Babcock*, 85 Fed. 978. In that case, certain seamen left the vessel without cause, were arrested and taken before a consul, and at the request of the master were delivered to the custody of the Hawaiian police authorities. The shipowner was permitted to set off against their claimed wages, the charges of their arrest and detention, the wages of their substitutes, and the amount which was necessarily paid by the vessel to the shore authorities as a penalty for the wilful breakage of a shop window by the seamen on their way to the vessel under custody.

4. The decision of the Court of Appeals for the Third Circuit is in conflict with the following cases decided by various lower federal courts over a period of almost a century:

The T. F. Whiton, Fed. Cas. No. 13,849 (D. C., S. D. N. Y., 1879).

Brown v. *The Neptune*, Fed. Cas. No. 2,022 (D. C., E. D. Pa., 1829).

The Ellen Little, 246 Fed. 151 (D. C. Mass., 1916).

Macomber v. *Thompson*, Fed. Cas. No. 8,919 (Circuit Court, Dist. Mass., 1833).

The Marjory Brown, 134 Fed. 999 (D. C., S. D. N. Y., 1905).

Scott v. *Russell*, Fed. Cas. No. 12,546 (D. C., S. D. N. Y., 1848).

Snell v. *The Independence*, Fed. Cas. No. 13,139 (D. C., E. D. Pa., 1830).

5. The Court of Appeals for the Third Circuit has construed a statute, R. S. Sec. 4596, which has heretofore

never been construed by this Court with respect to its relevance to civil disputes between shipowner and seaman as to the amount owing the seaman at the termination of a voyage. R. S. Sec. 4596 is a penal statute, the object of which is to lay down a code of discipline and establish punishment for its violation. As such, the statute is irrelevant to any determination of the civil rights of shipowner and seaman, *inter se*. Ignoring this basic distinction, the Court of Appeals for the Third Circuit has decided, in effect, that where a seaman is not punishable under the statute, his employer cannot assert civil liability on the part of the seaman to the employer. The Court of Appeals persisted in treating the present controversy over civil rights and liabilities as a problem of crime and punishment, which it is not. Not only is this interpretation fundamentally fallacious; it can lead, and in this case has lead to a grossly inequitable and absurd result.

In construing R. S. Sec. 4596 as it did, the Court of Appeals for the Third Circuit has disregarded the precept of this Court in *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 437, that a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required. When R. S. Sec. 4596 was enacted, the shipowner's equitable right of set-off or recoupment was already firmly established in the general maritime law, the common law of the sea. Nothing in the statute, in the circumstances surrounding its enactment, or in the particular factual situation presented by the case at bar indicates or even suggests that the statute in any way affected the right presently asserted by Petitioner.

Wherefore, Isbrandtsen Company, Inc. prays that this Honorable Court may grant this petition for certiorari.

Respectfully submitted,

Isbrandtsen Company, Inc.,
By Thomas E. Byrne, Jr.,
Counsel for Petitioner.

I hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and entitled to the favorable consideration of the Court and that it is not filed for the purpose of delay.

Thomas E. Byrne, Jr.,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. Under the General Maritime Law, Petitioner Had the Right to Recoup or Set Off the Pecuniary Loss Sustained by It as the Result of Respondent's Acts, Against the Financial Emoluments Which Would Otherwise Have Been Payable to Respondent.

It is Petitioner's contention that it had the right to recoup or set off the pecuniary loss which it sustained by reason of Respondent's unjustified knife attack upon a fellow crew member, against the wages and value of transportation which would otherwise have been payable to Respondent.

The right which Petitioner asserts is firmly rooted in the general maritime law, and its scope is clearly delineated by decisions involving a variety of factual situations. Reference to the decided cases reveals that the shipowner's right to mitigate its loss is founded upon equitable principles to which admiralty courts have customarily resorted in adjudicating controversies presented to them.

In *The T. F. Whiton*, Fed. Cas. No. 13,849 (D. C., S. D. N. Y., 1879), the second mate of a vessel filed a libel to recover the sum of $91.75 as wages allegedly due him. The vessel owner, by way of defense, averred that the libellant, during the course of the voyage, had committed an assault and battery upon the vessel's steward, with the result that the steward was severely injured and was in danger of losing his life. The vessel incurred a loss of $120.00 in sums paid for medical attention for the steward, and in the loss of the steward's services. The court held

that under these circumstances, there was nothing due and owing the libellant. The court said:

> "That such an act on the part of a seaman, whereby the vessel suffers damage or is put to expense, is to be considered in diminution of a claim for wages, has been often held. (citing cases)"

The striking similarity between the facts of *The T. F. Whiton* and those of the case at bar is immediately apparent. Another case, *Macomber* v. *Thompson,* Fed. Cas. No. 8,919 (Circuit Court, Dist. Mass., 1833), stands for substantially the same proposition as does *The T. F. Whiton.* In *Macomber* v. *Thompson,* Judge Story was considering a factual situation in which a crew member had been insubordinate, had assaulted the second mate and the chief mate and had generally conducted himself in an insolent and mutinous manner. Judge Story said:

> "The charge thus set up in its actual presentation is certainly of a very high and aggravated nature. If it were completely borne out in its full extent by the evidence, it would call for the severe animadversion of the court. Some parts of the charge are, however, wholly unsupported, not only in form, but in substance."

The court then went on to point out that the shipowner had completely failed to establish that the losses which it attempted to set off against the wages claimed were directly attributable to the libellant's conduct, and therefore permitted only a partial set-off of the wages claimed. In the case at bar, there can be no question but that the amount of loss sustained by the Petitioner was the direct and proximate result of the Respondent's act in violation of the contract of employment.

There are many other analogous cases under the general maritime law where, in an action for wages by a seaman,

the admiralty courts have permitted the vessel owner to set off losses which it had sustained by reason of the libellant's dereliction of duty. In *The W. E. Babcock*, 85 Fed. 978 (C. A. 2, 1898), certain seamen left the vessel without cause, were arrested and taken before a Consul, and at the request of the master were delivered to the custody of Hawaiian police authorities. The shipowner was permitted to set off against their claimed wages the charges for their arrest and detention, the wages of their substitutes, and the amount which was necessarily paid by the vessel to the shore authorities as a penalty for the willful breakage of a shop window by the seamen on their way to the vessel under custody.

The Ellen Little, 246 Fed. 151 (D. C. Mass., 1916), was a case in which the libellant, an officer of the vessel, and other crew members took no measures to prevent the smuggling ashore of a stowaway, although libellant knew that the stowaway was aboard the vessel. Federal authorities detained the vessel for a few days, and other expenses were incurred by the ship as a result of the smuggling incident. The court deducted from the libellant's pay a proportion of the loss occasioned the shipowner commensurate with the libellant's fault as compared with that of other crew members, some of whom appeared to have been equally culpable.

In *Brown* v. *The Neptune*, Fed. Cas. No. 2,022 (D. C., E. D. Pa., 1829), the vessel owner was permitted to deduct from wages claimed, with respect to one libellant, the loss actually sustained by the vessel by reason of the libellant's wrongful absence from the ship, and with respect to another libellant, the vessel owner was permitted to deduct the value of an article belonging to the vessel which had been lost by his inattention and carelessness. In *Spell* v. *The Independence*, Fed. Cas. No. 13,139 (D. C., E. D. Pa., 1830),

the shipowner was allowed to deduct a proportionate share of demurrage expenses occasioned by the libellant's refusal to perform duty, and also police costs and charges incurred as a result of the seaman's improper conduct while ashore. See also *Scott* v. *Russell*, Fed. Cas. No. 12,546 (D. C., S. D. N. Y., 1848); and *The Marjory Brown*, 134 Fed. 999 (D. C., S. D. N. Y., 1905).

Two recent appellate decisions deal with the shipowner's right to set-off or recoupment under the General Maritime Law: *Oldfield* v. *The Arthur P. Fairfield*, 176 F. (2d) 429, cert. den. 338 U. S. 879 (C. A. 9, 1949) and *Shilman* v. *United States*, 164 F. (2d) 649, cert. den. 333 U. S. 837 (C. A. 2, 1947). Rather than discuss the *Oldfield* and *Shilman* decisions piecemeal, we shall treat them under the next point in our argument, under which they would appear to have the most significant bearing upon the problem presented by this petition.

The foregoing cases stand, in general, for the proposition that a shipowner may set off against amounts otherwise owing to the seaman, the pecuniary loss sustained by the vessel as a direct result of the seaman's act in violation of the contract of employment. In particular, they hold that where a seaman has committed an assault upon another crew member, the set-off is allowable as to such losses as are proven to be the direct result of the assault: The *T. F. Whiton, supra*, and *Macomber* v. *Thompson, supra*. Under these authorities, and under the facts of the case at bar as found by the Trial Judge, it is clear that Petitioner had a right to recoup or set off its pecuniary loss when sued by the Respondent.

The rule laid down in the foregoing cases is by no means peculiar to the maritime law. Rather, these cases illustrate that the maritime law, on this point, is no different from the law pertaining to the master-servant relationship in

general. It is well settled that where a servant, by an act in violation of the contract of employment, causes pecuniary loss to his master, the servant is subject to *civil liability* to the master, and that the servant's civil liability may be successfully asserted by the master by way of set-off, counterclaim or recoupment, when the master is faced with an action for wages by the servant. *Restatement of Agency*, Sec. 399 (g), (k); Sec. 456; *Glennon* v. *Lebanon Mfg. Co.*, 140 Pa. 594; *Rosner* v. *Glove Valve Corporation*, 83 N. Y. S. (2nd) 496, affd. 87 N. Y. S. (2nd) 524; *Norris* v. *Cohen*, 27 N. W. (2nd) 277, 223 Minn. 471; *Greenleaf* v. *Huntingdon & B. T. M. R. & Coal Co.*, 3 F. R. D. 24; *Maratta* v. *Chas. H. Heer Dry Goods Co.*, 190 Mo. App. 420, 177 S. W. 718; 56 *Corpus Juris Secundum* (Master and Servant) Sec. 77, 79 (pp. 500, 502).

II. The Court of Appeals Erred in Concluding That Petitioner Could Not Recoup or Set Off Its Loss Because Respondent's Conduct Did Not Fall Within Any of the Categories Enumerated in R. S. Sec. 4596.

The cases under the general maritime law which we have previously discussed, and which established the rule for which Petitioner here contends, were rejected by the Court of Appeals. In the view taken by the Court of Appeals, the case turned upon the provisions of R. S. Sec. 4596, 46 U. S. C. A. Sec. 701. The Court held that since Congress, in this statute, had "legislated in the field of assaults committed by seamen and saw fit to prescribe no penalty for an assault by seaman upon seaman," it did not take the view "that such an assault must result in the loss of wages of the seaman assailant."

It is Petitioner's contention that the provisions of R. S. Sec. 4596 are neither relevant nor controlling in the case

at bar. R. S. Sec. 4596 is a penal statute, but the question in the case at bar has nothing to do with crime and punishment. All that Petitioner asserts is the existence of a financial obligation to it on the part of Respondent, arising out of the employer-employee relationship, and the right to recoup or set off this obligation in the Respondent's suit which is founded upon the same relationship. In so doing, Petitioner is not attempting to punish or penalize Respondent; its object is not to impose discipline, but rather to secure recompense by an orderly adjudication of its civil rights and liabilities.

That R. S. Sec. 4596 is penal in nature is readily apparent on its face. This statute lists eight categories of "offenses" which a seaman can commit, and prescribes the punishment for each. The language of R. S. Sec. 4610, 46 U. S. C. A. Sec. 711, which provides, inter alia, for the recovery of "penalties and forfeitures" imposed by R. S. Sec. 4596 is likewise significant. The reference to "conviction," "imprisonment," "penalty" and words of similar import in R. S. Sec. 4610 clearly reflects the nature of R. S. Sec. 4596 and the objects sought to be attained thereunder.

A brief reference to the derivation of R. S. Sec. 4596 is likewise enlightening. This section was derived from Sec. 51 of the Act of June 7, 1872, c. 322, 17 Stat. 273. Sec. 51 of the Act of 1872 immediately follows the general caption "Discipline of Seaman," and contains provisions which are similar in many respects to those now embodied in R. S. Sec. 4596.

The opinion of the Court of Appeals does not reveal to Petitioner any disagreement on the part of the Court with Petitioner's contention as to the nature of R. S. Sec. 4596. The point of departure is the analysis of the issues involved. The Court of Appeals persists in treating the problem in the case at bar as one of "discipline" or

"penalty," rather than of who owes whom how much, in which latter category it properly belongs.

The proposition of the Court of Appeals that R. S. Sec. 4596 codifies the only circumstances under which a seaman may be subject to civil liability to his employer was recently flatly rejected by the Court of Appeals for the Ninth Circuit in *Oldfield* v. *The Arthur P. Fairfield*, 176 F. (2d) 429, certiorari denied 338 U. S. 879. In the *Oldfield* case, the Court of Appeals permitted a shipowner to set off against wages claimed, the libellant's pro rata share of a fine paid by the shipowner for release of the vessel, which had been imposed by Dutch customs officials because of a smuggling attempt in which the libellant had participated. The libellant had not been tried for the offense of smuggling and *a fortiori* had not been convicted. Although R. S. Sec. 4596 provides no "penalty" or "punishment" for the seaman under these circumstances, the Court of Appeals held that this fact cannot be construed as an abolition of the equitable right of recoupment belonging to the shipowner.

The Court of Appeals for the Second Circuit in *Shilman* v. *United States*, 164 F. (2d) 649, certiorari denied 333 U. S. 837, likewise rejected by implication the contention that the shipowner is without a civil remedy where the seaman's conduct in violation of the contract of employment has caused pecuniary loss to the vessel's interests. The *Shilman* case involved an attempt by the United States, in its capacity as shipowner, to set off against wages claimed by a seaman, the amount of a fine imposed upon the seaman by a United States Army court martial in a foreign country. The Court of Appeals (at 164 F. (2d) 651) first referred to various statutory provisions which authorized deductions from wages. It then cited several

cases (including *The T. F. Whiton*, *supra*, at 164 F. (2d) 652) under the general maritime law wherein set-offs had been allowed with respect to expenses incurred on behalf of the ship in connection with the voyage. The Court then proceeded to distinguish the case before it from those arising under the general maritime law on the ground that, in the pending action, the shipowner was not seeking to recover any expenditure caused during the course of the voyage, or for the benefit of the ship; nor was there any evidence that the ship or her owner had suffered any loss by reason of the seaman's conduct. The clear implication of the *Shilman* opinion is that the Court of Appeals for the Second Circuit considered the cited cases under the general maritime law as authoritative and applicable upon their facts.

The Court of Appeals for the Ninth Circuit, in the *Oldfield* case, recognized this implication of the *Shilman* opinion. In reaching its conclusion, the Court in the *Oldfield* case noted (at 176 F. (2d) 431) that the "right of recoupment has . . . recently been recognized again" in the *Shilman* case, and quoted extensively from that portion of the *Shilman* opinion which cited cases under the general maritime law supporting the right of the shipowner to set off losses incurred by the ship in connection with the voyage, as the result of the seaman's conduct.

The view taken by the Court in the *Oldfield* case as to the efficacy of the general maritime law, the statute notwithstanding, in controversies involving civil liabilities finds a striking parallel in the construction given over a century ago by admiralty courts to the Act of July 20, 1790, c. 29, 1 Stat. 131 *et seq.* This Act contained, inter alia, the forerunner of the sections of R. S. Sec. 4596 dealing with the offenses of absence from duty and desertion on the part of seamen.

Judge Story, in *Cloutman* v. *Tunison*, Fed. Cas. No. 2,907 (C. C., D. Mass., 1833) held unequivocally that the Act of 1790 merely created certain statutory offenses, and did not in any way impair the maritime law. "It does not supersede the general doctrine of the maritime law or repeal it; but merely in a given case applies a particular rule *in poenam*, leaving the maritime law in all other cases in full efficiency" (at 5 Fed. Cas. p. 1094).

This principle was reaffirmed by Judge Story in *Coffin* v. *Jenkins*, Fed. Cas. No. 2,948 (C. C., D. Mass., 1844), wherein Judge Story referred to the desertion proscribed by the Act of 1790 as "an auxiliary statute desertion, distinguished from and independent of that of the maritime law . . ." (at 5 Fed. Cas. p. 1190). In 1883, Judge Addison Brown in *Welcome* v. *The Yosemite*, 18 Fed. 383, referred to the principle enunciated by Judge Story as "the settled construction" of the Act of 1790, reiterating that the provisions of the Act of 1790 "were designed to supplement the maritime law, and not to repeal or to supersede it" (at 18 Fed. 384). To the same effect, see *The John Martin*, Fed. Cas. No. 7,357 (D. C., E. D. Mich., 1870) and *The Osceola*, Fed. Cas. No. 10,602 (D. C., S. D. N. Y., 1846).

The provisions of R. S. Sec. 4529, 46 U. S. C. A., Sec. 596, referred to by the Court of Appeals in the case at bar are likewise irrelevant to the question presented. This statute provides for the recovery of "double wages" by the seaman in instances where his wages have been withheld "without sufficient cause" beyond certain stated periods after the termination of his engagement. This statute deals solely with the *time* for payment. It does not undertake to liquidate the amount, if any, owing to the seaman at the termination of the voyage, nor does it even suggest a limitation upon the defenses, set-offs, or other claims which may be asserted by the shipowner in a suit by the seaman

for wages after the termination of the voyage: It is worth noting, in passing, that this statute is in itself an effective deterrent to arbitrary or capricious refusal to pay a seaman's wages. The denial to the shipowner of the right of recoupment or set-off here asserted by Petitioner is clearly unnecessary to achieve that purpose.

In construing R. S. Sec. 4596 to deny to Petitioner the right of set-off or recoupment, the Court of Appeals has disregarded the precept of this Court in *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 437, that a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required. When R. S. Sec. 4596 was enacted, the shipowner's right of set-off or recoupment, as the previously cited cases demonstrate, was already firmly established in the general maritime law, the common law of the sea. Nothing in the statute, in the circumstances surrounding its enactment, or in the particular factual situation presented by the case at bar, indicates or even suggests that the statute in any way affected the right presently asserted by Petitioner. The statute merely provides penal sanction for certain offenses, whereas the general maritime law establishes the civil rights and liabilities of the seaman and shipowner, *inter se*. Thus there is no conflict between the general maritime law and the statutory law; on the contrary, they are wholly compatible, when one considers the difference in the underlying purpose between these two different sources of law. Viewed in this light, their co-existence is natural, and detracts nothing from their mutual vitality.

III. The Court of Appeals Erred in Invoking the Doctrine That "Seamen Are Wards of the Admiralty" to Support Its Denial of the Equitable Right of Set-Off or Recoupment to the Petitioner.

Certain considerations of policy appear to have influenced the Court of Appeals' determination of the case at bar. The major premise of the Court's dissertation on the policy underlying its decision seems to be the fact that seamen are "wards of the admiralty."

That this doctrine pervades the maritime law has been demonstrated in a multitude of cases too numerous to mention. The doctrine had its origin in a bygone era when service in the merchant marine was something akin to serfdom. Its object was to mitigate by judicial solicitude the intolerable conditions which surrounded maritime employment in the early days of American merchant shipping.

Petitioner deems it unnecessary to discuss in this Brief the abstract question of whether, in this day of enlightenment, there still exists any justification for the application of the "wardship" doctrine in the maritime law. It may be assumed, for present purposes, that in a controversy where the equities are evenly or fairly evenly divided between seaman and shipowner, the doctrine may be determinative of the result.

However, Petitioner earnestly submits that the doctrine can have no application whatever to the situation presented by the case at bar. Here the doctrine, with its implications of liberality, was invoked to exculpate from civil liability a seaman who had attacked and seriously wounded a shipmate with a deadly weapon. What is more, this exculpation saddled a perfectly innocent shipowner with a financial loss approximately three times as great as the amount awarded the seaman.

We cannot think that any conscientious guardian would countenance, much less encourage this type of conduct by insulating his ward from the consequences of his acts, especially to the detriment of an innocent bystander. Since the wardship doctrine has become, for practical purposes, a substantive part of the maritime law, it is important to seaman and shipowner alike that this Court delimit the field of its operation to situations where its impact is not offensive to fundamental notions of justice. Petitioner therefore respectfully urges this Court to examine and correct the indiscriminate application of the wardship doctrine which assisted in producing the result in the case at bar.

Conclusion

The Petitioner's prayer for a writ of certiorari should, therefore, be granted.

Respectfully submitted,

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